United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

To be argued by:
BARRY B. SILVER, ESQ.
(30 min.)

74-1925 B

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
DECEMBER TERM, 1974

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UNITED STATES OF AMERICA,

Appellee,

-against-

WILLIAM LEE,

Appellant.

----------x

DOCKET NO
74 CR 192

BRIEF FOR APPELLANT

ON APPEAL FROM A CONVICTION & SENTENCE
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

****in order for a knowingly false statement to be material it must be shown that a truthful answer would have been of sufficient probative importance to the inquiry so that, as a minimum further fruitful investigation would have occurred." U.S. v Freedman (2d Cir. 1971), 445 F.2d 1220, 1226

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

-v-

WILLIAM LEE,

DOCKET NO.
74-CR 1925

Appellant.

----------x

QUESTIONS PRESENTED FOR REVIEW

I Whether the Government proved the answers to questions in Counts One and Three were materially false.

II Whether the Trial Court's charge on materiality was improper.

III Whether the Trial Court's charge on circumstantial evidence was improper.

IV Whether a conviction under 18 USCA 1623 requires proof of "irreconciliably contradictory declarations material to the point in question."

V Whether the 6 months imprisonment sentence should be suspended in the interests of justice.

VI Whether the modified Allen charge coerced the minority into a unanimous verdict of guilty on Counts One and Three

VII Whether the Count One and Count Three Questions fail to satisfy the precise question rule of Bronston v U.S.

VIII Whether 1623 is unconstitutional.

IX Whether the failure to provide Appellant with specific information in a bill of particulars prejudiced his ability to prepare for trial.

STATEMENT PURSUANT TO RULE 28(3)

Preliminary Statement

This appeal is from a judgment (conviction and sentence) of the U. S. District Court for the Southern District of New York (Hon. Charles L. Brient, Jr.,) entered on June 27, 1974 sentencing Appellant to six months on Count One and one day on Count Three.

Timely notice of appeal was filed, and assigned trial counsel was continued as counsel on appeal pursuant to the Criminal Justice Act. Appellant remains free on $500.00 bail. The appeal is being heard on the original record in lieu of the appendix method.

Statement of Facts

In August of 1972 a federal Grand Jury was impannelled in the Southern District of New York. The geographical area of the August, 1972 Grand Jury was Orange county, Newburgh specifically (T. 280). According to the Grand Jury foreman, the general probe related to "investigating gambling, local obstruction of justice by payoffs and bribery" (T. 377).

From February 1962 until May of 1973, the Appellant, William Lee, the indictee in Indictment 1007 cr. 73, was a member of the Newburgh Police Department. In 1971 he, and

George MacNeally, the now deceased former Mayor of Newburgh, brought to the attention of the Orange County District Attorney, the fact that several Newburgh Police Officers were involved in a crime in Newburgh (T. 344).

Subsequent to this disclosure, many members of the Newburgh police department, including its Chief, Humbert Cappelli, Thomas Stacklum, and John Maney were indicted, and either pled guilty (Maney) or were tried and convicted by the District Attorney. The Appellant testified at Cappelli's trial (T. 348) as a People's witness.

Later, about two weeks after Easter, 1973, William Lee was contacted by an investigator of the New York State Police Bureau of Criminal Investigation (B.C.I.) relative to the Grand Jury investigation (T. 347). The investigator told him that he and F.B.I. Investigator Reutter wanted to talk to him about payoffs and bribery that he might be involved in (T. 348). William Lee, still a police officer at the time, told the B.C.I. investigator that he didn't want to talk to him (T. 348).

Two weeks later the B.C.I. Investigator telephoned William Lee and advised him of a subpoena to testify before the Grand Jury (T. 348).

About one week prior to testifying before the Grand Jury, William Lee was interrogated by a special attorney from the U. S. Attorney's office who asked him who

was he "bugging for." (T. 349). He denied bugging for anyone, was granted time to consult his attorney, and was told to come back to Foley Square a week later. (T. 349).

William Lee returned to N.Y.C. on April 25, 1973, was sworn as a witness, was informed by the Ass't U.S. Attorney inside the Grand Jury room that he was a possible target of the Grand Jury investigation and that he "may be indicted in this investigation" (p 2. Grand Jury Transcript, 4/25/73). The 67 pages of subsequent questions and answers dealt with William Lee's activities as a Newburgh police officer, his relationships, if any, with Newburgh gamblers, prostitutes and other persons and whether he received any money from sources other than his employment or his relatives. Prior to the questioning of William Lee the Government had made an extensive investigation into whether William Lee received any payoff money from gamblers or prostitutes while he was a police officer. With regard to William Lee's testimony and the general probe, the Grand Jury was especially looking into "payoffs to police, payoffs from gamblers & prostitutes." (T. 279).

Based on William Lee's answers to the prosecutor's questions he became the defendant in a four count superceding indictment charging him with making false material declarations in violation of 19 USCA 1623.

William Lee was put to trial on the indictment on

November 14, 1973. During trial some of the questions and answers in the indictment were withdrawn from the jury's consideration. The government witnesses were Cappelli, Stocklum, Maney, three other criminals, Boone, Simon and Smerk, an unemployed prostitute, Ms. Price, and the Grand Jury foreman.

On November 17, 1973, after a four day jury trial, a verdict was returned acquitting Defendant on Counts two and four, and convicting Defendant-appellant on Counts one and three.

Thereafter, a motion was made to Dismiss Count three of the Indictment by virtue of newly discovered evidence. This motion produced a hearing after which the motion was denied in a decision filed June 14, 1974.

On sentencing, the Defendant-appellant was sentenced to six months on Count one and one day on Count three

The Indictment

The Grand Jury prosecutor's questions, and the answers deemed materially false by the Government, are hereinafter set forth, except for those set forth in Counts two and four (acquittal) and those which were withdrawn by the tiral Court from the jury's consideration:

Count One

"'Q. Did you ever receive any money from Mr. Handler?
"'A. No, sir.
"'Q. Other than money from relatives and money from the employments that you have just mentioned and money from the Police Department, have you received money from any individual?
"'A. No, I have not.
"'Q. You are positive of that?
"'A. I am positive of that.
"'Q. Have you received any property of any sort from any people other than employers that you have just mentioned or your relatives?
"'A. No, I haven't."

Count Three

"'Q. Do you know Earl Manlay Boone?
"'A. I know a Pee Wee Boone.
"'Q. Pee Wee Boone, Did you ever pick up money from him?
"'A. No, sir."

ARGUMENTS

POINT I

THE 1623 CONVICTION MUST BE REVERSED BECAUSE THE GOVERNMENT FAILED TO PROVE MATERIALITY, i.e., THAT THE INVESTIGATION WAS IMPEDED BY HIS DENIALS AND THAT FRUITFUL INVESTIGATION WOULD HAVE OCCURRED IF APPELLANT'S ANSWERS TO QUESTIONS WERE DIFFERENT.

1621 Materiality The Same As 1623 Materiality

Both 1623 and 1621 use the exact same word, "material," in describing the conduct forbidden by law. 1621 makes it a crime for a person, wilfully and contrary to an oath, to state "any material matter which he does not believe to be true." 1623 makes it a crime for a person under oath to knowingly make "any false material declaration."

Since the qualifying adjective is identical, it is Appellant's position that the concept of materiality under 1623 is coextensive with the materiality requirement of the general perjury statute, Section 1621. Cases interpreting 1621, therefore, are, in this respect, applicable to 1623.

Definition of Materiality

In interpreting 1621, this Circuit has recently rejected the argument "that a knowingly false statement under oath is a material matter [merely] if its natural effect or tendency is to influence, impede or dissuade further investigation" (Government's argument in U.S. v Freedman (1971), 445 F.2d 1220, 1226). The Government in Freedman (and therefore in Lee) was held to a stricter burden of proof:

> We do not believe, and it is not seriously argued, that every knowingly false statement under oath is perjurious, for such a ruling would eliminate the materiality requirement. The Government's analysis ignores in Carroll what we perceive to be a second essential element in establishing materiality. Implicit in that holding, and in succeeding cases, is the recognition that the "further investigation" of which they speak must have some probative value connected with the scope of the inquiry." That is to say, in order for a knowingly false statement to be material within the purview of §1621, it must be shown that a truthful answer would have been of sufficient probative importance to the inquiry so that, as a minimum, further fruitful investigation would have occurred. Proof of this was absent at trial, and we repeat once again that the materiality of a false statement must be proved to sustain a perjury conviction. (U.S. v Freedman [C.A. 2.d 1971] 445 F2d 1220, 1226, 1227) emphasis added.

Accordingly, if the record below fails to indicate that "further fruitful investigation would have occurred" if Appellant had answered "yes" to the Count one and Count three questions, then this Court, like the Court in Freedman must reverse the conviction because Appellant's denials ("No," "No, Sir"), even if proven to be false, were not material matters upon which a 1623 charge can be founded.

Provinzano Analogy

The Court is respectfully urged to follow the Wisconsin District Court's reasoning in U.S. v Provinzano (E.D. Wisc. 1971), 333 F. Supp. 255. There the District Court dismissed a perjury count and entered a judgment of acquittal on the authority of U.S. v Freedman (2d cir. 1971), 445 F. 2d 1220, 1226, citing Freedman's materiality requirement that the Government must prove that a truthful answer would have been of sufficient probative importance to the inquiry that, at a minimum, further fruitful investigation would have occurred.

In Provinzano the accused in the 1621 indictment, gave a "no" answer to the following question:

> "Have you ever, at any time, under any circumstances, made any homosexual advances to Mr. William Lassow, a Tax Technician, under your general supervision?"

At the trial the Government proved beyond a reasonable doubt that the "no" answer was false. However,

on the date the question was asked, January 15, 1970, the I.R.S. investigation into the accused's homosexual advances to the subordinate was virtually completed. The January 15, 1970 interrogation represented the I.R.S. hope that the accused would confirm what the prior investigation had already brought forth. The I.R.S. had already obtained evidence weeks prior to the question and false answer that the accused had in fact made homosexual advances to the named tax technician. The Government had already made an exhaustive inquiry after October 23, 1969 into the perjury indictee's affairs and contacts with the tax technician. The investigators had affidavits of the technician and various other material which was assembled prior to the date of the I.R.S. investigator's questionning of the defendant.

On the foregoing facts the Provinzano Court stated:

> "The extensiveness of the investigation of Mr. Provinzano and the fact that it seems to have been completed prior to the time that the defendant was interrogated make it doubtful that the inquiry directed to the defendant in count III of the indictment possessed the "materiality" necessary to support a conviction under 18 U.S.C. § 1621."(Id., at 257)

Addressing itself to materiality the Court further stated:

> "Even if it may be assumed that the defendant's answer in count III of the indictment is false, it is my opinion

that the question which provoked such answer was immaterial in light of the consummate investigation which already had been conducted." (Id. at 258)

Citing the "further fruitful investigation would have occurred" requirement of Freedman, the Court in Provinzano held:

> "It is clear that all the needed or fruitful investigation in the administrative action of the Internal Revenue Service already had been accomplished by January 15, 1970; no significant investigation occurred after the date of the interview with the defendant to substantiate the charge contained in count I of the indictment or to support the administrative determination to charge Mr. Provinzano with personal misconduct."
>
> "The government urges that the court must ignore the actual result of Mr. Provinzano's answer and look to the possible or potential impact upon the investigators. Upon the facts of this case, under either approach, the defendant's response was immaterial. In my opinion, the Internal Revenue Service had completed its administrative case against Mr. Provinzano and his denial was totally devoid of either actual or potential capacity to mislead the investigators. Nothing that Mr. Provinzano could have said at the January 15th interrogation would have provoked "further fruitful investigation", in the words of United States v. Freedman, supra. The government has failed to prove an essential element of the perjury charge, and count III must be dismissed." (Id., at 259, emphasis added)

The Lee facts are analogous to Provinzano and on the persuasive authority of that case, this Court should reverse Appellant's conviction since his "no" responses, in Counts One and Three were immaterial for the same

reason that Mr. Provinzano's "no" response was immaterial.

Appellant's position,-implicit in the reasoning of Provinzano-may be put in the following syllogism: (1) Major premise: to be impeded, there must be an unknown which the Government wanted to obtain by questioning. (2) Minor Premise: But the prosecutor already had the requisite payoff information. (3) Conclusion: Therefore, a negative answer may not validly be said to have impeded the Government investigators because there was no unknown fruit to discover. A yes answer would only have confirmed what the prosecutor already knew.

It is submitted that when the Court peruses the "3500" material, and the trial record, it will become apparent that all the needed or fruitful investigation into Appellant's receiving money or picking up money from certain gamblers had been virtually accomplished by April 25, 1973. Thus, even if false, Appellant's April 25, 1973 denials that he received or picked up money from Mr. Handler or Mr. Boone were totally devoid of either actual or potential capacity to mislead the Grand Jury prosecutor who already knew what the answers should be.

On April 25, 1973, Appellant, a former policeman, the Grand Witness, was a target of the Grand Jury investigation. Nothing that Appellant could have said on April 25, 1973 in answer to the Count One and Three

questions would have provoked further fruitful investigation "into payoffs to police (i.e. to William Lee) from gamblers, i.e. Mr. Handler, and prostitutes, i.e. Mrs. Nell Lattimore)" (T. 279), because the Government had completed or virtually completed its investigation of his alleged relationship with Handler and others before April 25, 1973. The questions, like the answers, were immaterial.

The Government must concede, in its answering brief or on the oral argument, that its needed or "fruitful" investigation into whether William Lee received money from Handler, Nellie Williams, Boone and Betty Price had been virtually accomplished on or before April 25, 1973. Otherwise, it makes a liar out of the Grand Jury prosecutor when he advised Appellant on April 25, 1973. "Sir, at this time I wish to inform you of your rights and state to you that you are a possible target of this investigation, meaning that you may be indicted in this investigation." (Grand Jury Transcript of 4/25/73, p 2) The prosecutor could not truthfully make that statement unless his prior investigation and the statements from Government witnesses already revealed the alleged payoffs, i.e. already revealed what the correct answers should be.

The Grand Jury transcript conclusively establishes Appellant's position because the questions asked

in Counts One and Three were obviously predicated upon investigatory information already furnished to the Government by its prospective trial witnesses.

The information brought forth by the pre-April 25, 1973 investigation of William Lee not only provided the basis for the questions asked, (at pages 27, 34, and 35 and elsewhere), it also provided a basis for the Government to disbelieve Appellant's "no" answers.

The information ascertained in the Government Strike Force's prior virtually completed investigation prompted Counts One and Three of the 1623 indictment, because the Government contrasted Appellant's answers with the results of its investigation and then concluded that his answers were falsehoods.

The 3500 material reveals that John Maney's statement to the F.B.I. was on January 22, 1973. The Christmas gift money, the box of candy and pint of liquor he testified to at the November, 1973 trial were mentioned in the January 22, 1973 statement. Thus, on April 25, 1973, when William Lee was asked the Count One questions about receiving money, the prosecutor knew what the answer should be.

The "Augie Smerk" referred to at pages 31 and 32 of the Grand Jury transcript is the August Smerk who prior to 4/25/73 furnished useful information to the Government concerning payoffs by gamblers (Handler) to

police (William Lee).

Smerk's pre-4/25/73 "3500" statement to the Government indicates "Handler told him that $6-700 per week went to a certain person and that "300 was divided among" 2 persons "and William Lee." In addition, the Government investigatory report reveals that "Smerk stated that he delivered to Lee an envelope containing money that he received from Dolores Mitchell, an employee of the Handler operation, in the Forge Hill Garden apartments, apartment 42." Thus, when the Count One questions were asked of Appellant on April 24, 1973, the prosecutor already knew from Smerk's prior statements, as well as from the prior statements of the other Government witnesses, that the answers regarding receiving money should be "yes" and not "no" as far as the Government was concerned.

The 1623 indictment alleges that it was material to the investigation "that the grand jury ascertain facts as to whether defendant William Lee, while a member of the City of Newburgh Police Department, had received money from Allan Handler, Nellie May Lattimore Williams, Earl Boone, a/k/a Pee Wee Boone, Betty Price and others." Since the Government's pre-4/25/73 investigation had already brought forth that Willaim Lee had received money from said individuals, it is preposterous to claim that Appellant's negative answers impeded the investigation

into William Lee's receipt of such money. The 3500 material reveals that the Government already possessed the facts which the indictment recites the Grand Jury investigation wanted to ascertain on 4/25/73 by its questioning of William Lee. The recitation in paragraph "3" of the indictment is sheer hypocracy on the part of the Government because it already knew what the answers should be to the questions asked. No fruitful investigation would have occurred if the answers were affirmative instead of negative because the fruit had already been harvested. The Government trial witnesses had already given statements to the Government on the date the questions were asked.

In summary, the blanket denials of William Lee under oath on April 25, 1973 were immaterial, even if untrue, because they did not impede the investigation, mislead the investigators or prevent further fruitful investigation from occurring. The Strike Force had already completed or virtually completed its case against Appellant on the day he testified. The only unfinished work was to select a federal crime to charge him with. The Government chose 18 U.S.C. 1623. Since the Government failed to prove materiality, an essential element of the material false declaration charge, the conviction under Count One and Three must be reversed.

In addition, the 3500 material indicated that on January 23, 1973 the Government possessed a statement from trial witness Acril Simon, which was given to the Government (F.B.I.) on January 17, 1973. Simon informed the Government, prior to Appellant's Grand Jury testimony, that : 1. Simon followed Handler in a separate car when Handler once drove to Downey Park where Handler handed the money to Lee who was driving a patrol car.

Thus, on April 25, 1973 when the prosecutor received "No, Sir" and "No, I have not" answers to the questions asked at pages 27 (line 3) 34 (lines 20-25) and 35 (lines 1-6) of the Grand Jury minutes, these answers did not impede the Grand Jury investigation into whether William Lee, while a member of the city of Newburgh Police Department, had received money and envelopes from Allan Handler (para. "3" of indictment 73 cr 1007). (2) The "no" answers, even if untrue, could not have been materially false on April 25, 1973 because the information sought by the April 25, 1973 questions had already been discovered by January 17, 1973 with the statement of Simon to the Government. Thus a "yes" could not "have been of sufficiently probative importance to the inquiry so that, as a minimum further fruitful investigation would have occurred." (U.S. v Freedman, Supra. at 12-27).

POINT II

THE TRIAL COURT IMPROPERLY FAILED TO CHARGE THAT MATERIALITY MEANS THAT A TRUTHFUL ANSWER TO GRAND JURY QUESTIONS WOULD HAVE CAUSED FURTHER FRUITFUL INVESTIGATION TO HAVE OCCURRED.

Even if this Court rejects the argument in Point I and declines to be guided by Provinzano's interpretation of Freedman, nevertheless the trial court's charge as to materiality was improper as a matter of law, and warrants a reversal of the conviction.

The convicted Appellant was entitled to a charge, in words or substance, that in order for his alleged mistatements of fact to be material,

> "It must be shown that a truthful answer would have been of sufficient probative importance to the inquiry so that, as a minimum, further fruitful investigation would have occurred." (U.S. v Birrell, 2nd Cir. 1972) 470 F.2d 113.

There is a vast qualitative and quantative difference between "would" and "might". A trial juror would not have to possess a degree in semasiology to realize the difference between the U.S. v Birrell standard of materiality and the broader all encompassing standard of the Trial Court. One quant um of evidence would have been required to satisfy a juror beyond a reasonable doubt that "further fruitful investigation would have occurred" if Appellant had answered "yes" instead of "no".

to the question in Count One and Three questions.

However, quite another and considerably lesser quantum of proof was required to satisfy this trial jury that a yes answer ["any testimony" T. 449] "might [i.e. could possibly] give the grand jury a [i.e. any) lead in digging out such federal crimes" (T. 449).

After all, it is axiomatic that anything is possible.

Under the Trial Court's all encompassing, catch-all standard of materiality the jury was allowed to speculate, to use its collective imagination to conjure up any number of possibilities which could satisfy a materiality finding. In fact the Trial Court instructed the jury that if it believed the testimony of the Grand Jury foreman "you must find that the testimony given was material" (T. 448). Since the foreman's testimony was not contradicted, the jury, on the basis of the Trial Court's charge was compelled to find that the responses were material. Thus, this instruction effectively operated to relieve the prosecution of its burden to prove the element of materiality beyond a reasonable doubt. Accordingly, the conviction should be reversed. The failure to charge in accordance with Birrell and Freedman is plain error under Rule 521 thus omitting to act under Rule 30 when the erroneous charge was given should not prevent the issue from being raised on appeal.

POINT III

THE TRIAL COURT ERRONEOUSLY CHARGED THE JURY REGARDING CIRCUMSTANTIAL EVIDENCE.

In connection with Count One the Trial Court instructed the jury as follows with respect to Government

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POINT III

THE TRIAL COURT ERRONEOUSLY CHARGED THE JURY REGARDING CIRCUMSTANTIAL EVIDENCE.

In connection with Count One the Trial Court instructed the jury as follows with respect to Government

testimony about certain envelopes allegedly received by Appellant (T. 455, 456)

> "You may consider whether envelopes contained or did not contain money or something else and you can consider all the surrounding circumstances and how and under what conditions envelopes were given, if they were given. You may, but of course you need not, infer that it was money in the envelope, but this inference like all inferences following from facts, is for you and for you alone."

As trial counsel correctly pointed out in summation (T. 408) the Appellant was not charged with the crime of receiving money from Mr. Allan Handler. However, in order to prove beyond a reasonable doubt that Appellant's "no" answers to the questions listed in Count One were knowingly false, the prosecution had to produce evidence to demonstrate beyond a reasonable doubt to the jury that Appellant had in fact received money from Mr. Handler. The prosecution relied on alleged observation testimony about receiving envelopes, and asked the jury to infer that the envelopes contained money from Handler even though the alleged observers themselves did not testify as to what, if anything, was inside the envelopes. This circumstantial evidence of receiving money from Handler was so weak that at one point in the jury's deliberations three cast a "no" (i.e. not guilty) vote on their ballot (T.480), thereby indicating the Government had failed to prove beyond a reasonable doubt that money was in fact

inside the envelopes.

When the trial court instructed the jury on circumstantial evidence (T. 442, 443) it enabled the jury to convict Appellant under Count One ("receive money") under an improper, insufficient, less stringent standard of evidence than the applicable law demands under the circumstances of this case. It is Appellant's position that in order for it to be legally sufficient proof of guilt, circumstantial evidence must exclude to a moral certainty every other hypothesis but one of guilt. (People v Cleague (1968), 22 NY2d 363, 292 NYS2d 861; People v Bearden (1943), 290 NY 478, 480, 49 NE2d 785, 786.) The exact language of Cleague is as follows: "The facts from which the inference of defendant's guilt is drawn must be established with certainty - they must be inconsistent with his innocense and must exclude to a moral certainty every other reasonable hypothesis." As the 5th Circuit puts it: "The evidence in this case was largely circumstantial. Such evidence must be consistent with the guilt of the accused and also inconsistent with every reasonable hypothesis of his innocense." O'Brien v. U.S. (C.A. 5th 1969) 411 F. 2d 522, 524.

Moreover, where two inferences - such as envelopes did contain money or did not contain money - are equally valid, the defendant in a criminal case is entitled to the

favorable inference. (Miller v U.S. (1967 C.A. Ariz.), 382 F.2d 583, cert. den. 390 U.S. 984, 88 S. ct. 1108). Had the jury been so charged, 12 would have voted not guilty.

At trial, Mr. Smrek, a Wallkill prison inmate, testified that he handed Appellant "an envelope" (T. 237). There was no observation testimony, i.e. direct evidence that money was in the envelope. In fact, there was no testimony whatsoever by any of the convicted criminals called by the Government that any one at any time observed Appellant receiving money from Handler or receiving envelopes with money in it from Handler.

At trial Mr. Acrel Simon, who has been convicted of many crimes (T. 86), testified that he saw Mr. Handler pull "down the side of the police car, took an envelope, dropped it in the car and took off." (T. 46). There was no testimony, i.e. direct evidence, that there was money or anything else in the envelope; there was no testimony as to any conversation between Handler and Appellant concerning money or anything else. Mr. Simon did not see what, if anything, was in the envelope (T. 59) and never saw the inside of it (T. 70).

The Government's burden of proof related to Appellant's receiving "any money from Mr. Handler" (Count

One). It did not relate to receiving envelopes. [The "Did Allan Handler ever hand you an envelope?" question was properly withdrawn from the jury]. The evidence introduced to tend to establish that money was received inside the envelopes was circumstantial. Simon and Smrek didn't testify that they saw money dropped or received; it was envelopes. The trial court ruled in its post conviction decision June 14, 1974 (p. 6) that "The inference following from this testimony" of Simon and Smrek, was "that Lee was paid off by Handler." "Inference" deals with circumstantial evidence and the trial court's erroneous charge was as follows with respect to the two classes of evidence, direct and circumstantial "upon either of which the jurors may find an accused [i.e. Appellant] guilty of a crime." (T. 442)

> "Direct evidence tends to show the fact in issue without the need for any other amplification although, of course, there is always the question of whether it is to be believed. Direct evidence is what a witness tells you that he or he saw or heard or observed."
>
> "Circumstantial evidence is evidence that tends to show facts <u>from which the fact in issue may reasonably be inferred</u>. It is that evidence which tends to prove the fact in issue <u>by proof of other facts which have a legitimate tendency to lead the mind to infer that the facts sought to be established are true</u>.
>
> * * * * * * * * * * * * *
>
> "In other words, circumstantial evidence consists of facts <u>proved from which the jury</u>

> may infer by a process of reasoning other facts which are in dispute. Circumstantial evidence, if believed, is of no less value than direct evidence because in either case you must be convinced beyond a reasonable doubt of the guilt of the defendant." (T. 442, 443).

The Trial Court ended its circumstantial evidence instruction right there. It failed to instruct the jury that the Simon and Smrek testimony about envelopes - the circumstantial evidence of Appellant receiving payoff money from Handler - must exclude to a moral certainty every other hypothesis but guilt. Appellant submits that the circumstances of the case (convicted criminals with a motive to lie, testifying against a former police officer) demanded that Appellant have the benefit of a jury instruction that where two infernces are equally available - guilt and innocence - the defendant is entitled to the favorable inference. The envelopes could have contained money. They also could have contained nothing, a threat to kill, a laundry ticket, a list of gamblers furnished by Handler to Appellant, or perhaps even policy or numbers slips. The jury could - as it apparently did - infer from the testimony of these two Government witnesses that the envelopes delivered to Lee did not contain Bible tracts, (Opinion, 6/14/74, p. 2) but money. Under the Court's erroneous instruction, however, the jury was permitted to, and in effect was compelled

to make the money inference because the jury was told: (1) that circumstantial evidence "is evidence that tends to show facts (observation of envelopes) from which the fact in issue (was money inside?) may reasonably be inferred " (T. 442); (2) that circumstantial evidence, if believed, is of no less value than direct evidence" (T. 443).

It is submitted that without a qualifying instruction requiring the circumstantial evidence to exclude to a moral certainty every other hypothesis but one of guilt, the jury was compelled to make the guilty inference, i.e. money inside the envelope. The blanket , unqualified, instruction regarding circumstantial evidence gave them no real choice because in their deliberation, they didn't have to conclude that the envelope testimony excluded every other hypothesis but one of guilt. On the contrary, they only had to decide that the envelope testimony has "a legitimate tendency to lead the mind to infer that the facts sought to be established (money inside) are true. (T. 442)

The failure to properly charge the jury was reversible error. It deprived Appellant of jury deliberation according to a fair legal standard. The fact that Appellant did not act pursuant to Rule 30 is not

dispositive of the question on appeal, since the failure to charge on this fundamental issue was plain error within the meaning of Rule 52.

POINT IV

THE GOVERNMENT FAILED TO PROVE THE ALLEGED FALSITY OF THE DECLARATIONS SET FORTH IN COUNTS ONE AND THREE BY CONGRESS' MANDATORY STATUTORY STANDARD, NAMELY, "BY PROOF THAT THE DEFENDANT WHILE UNDER OATH MADE IRRECONCILABLY CONTRADICTORY DECLARATIONS MATERIAL TO THE POINT IN QUESTION" BEFORE THE AUGUST 1972 GRAND JURY ON APRIL 25, 1973 .

The superceding indictment (73 crim. 1007) accuses Appellant of making "false material declarations" on April 25, 1973, contrary to his oath "that he would testify truly before a grand jury of the United States."

Each Count of the four county indictment has a set of prosecutorial questions and Appellant's answers thereto. After each count there appears parenthetically: "Title 18, United States Code, Section 1623).

Section 1623 provides:

> §§ 1623. False declarations before grand jury or court
> "(a) Whoever under oath in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain

any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

"(b) This section is applicable whether the conduct occurred within or without the United States."

"(c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if--

"(1) each declaration was material to the point in questions, and

(2) each declaration was made within the period of the statute of limitations for the offense charged under this section.

"In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true."

"(d) Where, in the same continuous court or grand jury proceeding in which the declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed."

"(e) Proof beyond a reasonable doubt under this section is sufficient for confiction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence. (Emphasis added).

Appellant's position is that the underscored language applies to "any prosecution" under Section 1623, and therefore to this one. Since the very language of the statute refers to "this section" and not to any subsection, (such as subsection "(a)" or "(c)"), the underscored language necessarily refers not only to indictments couched in the language of subsection "(c)" but one, like 73 crim 1007, couched in the language of subsection "(a)". For this Court to hold otherwise would fly in the face of the cardinal rule of construction: "The general rule being that words are to be construed according to their usual meaning." (Mrs. Lockwood's case (1873), 9 ct. cl. 34C; cited in "Notes of Decisions, USCA 1, 1927 Ed.).

Of course, the usual meaning of "section" is section and not a mere part or subdivision or subsection thereof. Accordingly in order for this conviction to stand the falsity of the various delcarations set forth in 73 Crim 1007 must be established at trial by the proof prescribed in subsection "(c)".

Clearly, Congress intended a mandatory direction to the Courts when it used the word "shall" before the words "sufficient for proof", and not the word "may" (Cf. Bennett v Panama Canal Company (C.A.D.C. 1973) 475 F2d 1280, 1282). Had Congress intended to permit more than one method or standard of proof for a conviction

under Section 1623 it would have used the permissive word "may" and not shall. Thus, this Court is bound to use the standard "irreconcilably inconsistent declarations ....under oath" set forth in the statute because the auxiliary verb "shall" was employed by Congress. There is no discretionary character or element in that mandatory word.

The trial record contains no proof of such "irreconcilably inconsistent declarations....under oath". Accordingly the conviction must be reversed.

POINT V

SIMPLE FAIRNESS AND EQUAL JUSTICE UNDER LAW REQUIRE THAT THE SIX MONTH PRISON SENTENCE BE SUSPENDED.

In 1974, - the very year of Appellant's sentence - in the District Court of the Southern District of N.Y. - the very Federal District wherein a six months prison sentence was imposed upon Appellant, a 35 year old male American citizen, one Craig A. Braun, of Manhattan, had his one month jail sentence suspended by said Court.

Mr. Braun was convicted of the felony of tax evasion. He RECEIVED THE VERY SAME punishment that a California District Court imposed upon another man of power, the Nation's former top law enforcement officer, former Attorney General Richard G. Kliendiest, for false testimony under oath. Moreover, in the year preceding Appellant's

conviction, ex Vice President, Spiro T. Agnew, another man of power, received a 3 year suspended sentence from a Court in the Federal judicial system in a case involving $80,000 in payoffs. The no-jail recommendation for Mr. Agnew by the Dept. of Justice (former Att. Gen. Elliot L. Richardson) was on the ground that he had "suffered enough." The Federal sentencing Court followed the recommendation.

In suspending Mr. Braun's jail sentence, the District Court for the Southern District of New York, determined that there was a meaningful relationship between the event of the presidential pardon of one powerful American citizen, and the event of the previous imposition of one month's jail term on another citizen.

In suspending the jail sentence of Mr. Braun the District Court ruled: (1) that it could not "in justice" carry out the jail sentence imposed on a convicted tax evader in light of President Ford's unconditional pardon of the former President; (2) that Mr. Braun is not a criminal and not in need of any rehabilitation federal prison can offer; (3) that Mr. Braun had "suffered terribly" since 1967, and although sentencing judges often hear of "suffering enough," nevertheless "it tells a true and moving story" in Mr. Braun's case; (4) that the case may have involved as much as $22,000 in evaded taxes, but President Ford's pardon, by comparison, may have included tax evasion to the extent of several hundreds of thousands of

dollars; (5) that although comparisons are sometimes odious, they are the daily essence of the efforts of District Courts to be "fair and just" in sentencing convicted persons; (6) that the cases are different with respect to deterrence, but scarcely different in any way that makes it comfortable for the Court to be "harsher" toward Mr. Braun than President Ford was toward the pardoned Californian; and (7) that deterrence means making examples of people, and that the relatively anonymous defendant Braun adds at most to a mass of indistinguishable examples and that the alleged example of a topmost leader has been declared immune by the pardoning power.

This brief does not ask for a pardon for the convicted small town (city) formerpolice officer. Drawing the Court's attention to the unconditional pardon of a once powerful, now sick and disgraced, former Commander-in-Chief is not a device to thwart and prevent the operation of justice. It is not a request that this Appellate Court assume executive powers of clemancy. It is not an assertion that some powerful people seem to stand higher than others in the eyes of the federal law. It is merely a prayer for equal justice in the punishment area of the federal law. It is a request that the Court give a man without power, a man without pension, a man without influence, a virtual pauper who seeks only to stay with his family, to work, earn a

living and be a good example to his children, the same consideration in staying out of jail that a President, an ex-Vice President, an ex Attorney General, and an ex-Lieutenant Gov. of California received from federal authorities.

It is a request that this Court not place justice on two different levels - one for the rich and powerful (no jail) and another for the poor and powerless (six months in federal prison). If suffering enough" is a proper criterion for the few and the rich, then, in a proper case, fairness and equal justice demand that it be implemented for the poor and the many who come before the bar of justice for punishment.

It is respectfully submitted that what is justice for a relatively anonymous convicted N.Y.C. tax evader, is also justice for a relatively anonymous Newburgh resident convicted of false material declarations. This Court on appeal has the opportunity to do for Appellant what the Braun sentencing Court did for Mr. Braun, viz., give life to the principle carved in stone above the marble pillars of the main entrance to the Supreme Court of the United States in Washington, D. C. : "Equal justice under Law."

It is submitted that Appellant, like Mr. Braun is

not a criminal and not in need of any rehabilitation that six months in a federal prison can offer.

It is submitted that Appellant, a resident of a rural area, like Mr. Braun, a N.Y.C. individual, has suffered terribly since the date (4/25/73) of the crime charged in Indictment 73 crim, 1007.

In May of 1973 his employment with the Newburgh Police Department terminated. (T. 341). His career of 12 years, the job he satisfactorily worked at from February, 1962 to May, 1974, is down the drain forever. He can never return to police work, anywhere in New York or the U.S. of A. All of his worthwhile contributions to law enforcement which resulted in his earned promotions up-through the ranks, have gone for nought. He receives no pension and his family receives no benefits. Under the N.Y. Civil Service Law he cannot get a job in the Civil Service system because he is a convicted felon. The 12 years in the Department can never be the basis of retirement at any future public or private employment.

Even if the conviction is vacated for the meritorious reasons set forth elsewhere in this brief, the Appellant has suffered the disgrace and humiliation of a felony conviction. The trial and the unfavorable verdict received wide notariety in the City of Newburgh (See Memo and Order, Brient, J., 6/14/74, footnote 6) Thus,

Appellant has been punished publicly before the eyes of people in his own community. In a small community like Newburgh, unlike N.Y.C. where Mr. Braun may live in virtual anonymity, this is punishment enough.

The Appellant has been put through the gruelling experience of a four day trial (Nov. 14 - 17, inclusive), 70 miles from his home and family; he has been subjected to the ordeal of investigation by the State Police, the F.B.I., a departmental hearing by the Newburgh Police Department (May 10, 1973), a grand jury inquiry and lengthy post conviction proceedings.

The cumulative effect of the ordeal of the loss of his 12 year old job and being put to trial on the four count indictment was complete devastation of Appellant's meager finances. Appellant's financial ruin as a result of his job termination and the criminal proceedings against him is so complete that on April 30, 1974 the Trial Court deemed him an indigent qualifying for assigned counsel under the Uniform Justice Act. His indigency continues to the extent that he qualified for U.S.A. assigned counsel in this Court. In short, the criminal proceedings against him have left Appellant a virtual pauper.

Surely the foregoing is enough punishment. The additional punishment of six months in prison away from

his wife and family can hardly be justified under the foregoing circumstances.

Accordingly, it is requested that the justice and mercy of this Court shine equally as favorably on the non-powerful, poor, non well-placed Appellant, as it did on his peer, Mr. Braun.

POINT VI

THE SO CALLED MODIFIED ALLEN CHARGE WENT BEYOND THE PERMISSIBLE LIMITS OF ALLEN AND THEREBY COERCED THE MINORITY JURORS INTO A UNANIMOUS VERDICT.

At 12:45 p.m. of Friday, November 16, 1973, after 3 days of trial, the Trial Court submitted the 4 count indictment to the jury upon the testimony of Government witnesses "who by their own testimony, admitted being involved in gambling, prostitution and felonies, persons whose moral character is bad." (T. 459) Prosecutors traditionally have difficulty in getting unanimous guilty verdicts upon such testimony.

At 5:10 p.m., four hours and 25 minutes later, the jury was unable to unanimously decide the simple, non-complex issue of who told the truth -- the defendant or the convicted criminals who testified against him. The deadlocked jury's first note said: "We can't agree on any of the counts." (T. 465).

The Court also received a jury ballot in which the voting as to guilty ("yes") was as follows: As of 5:10 p.m., November 16, 1973: Count One - 9 yes, 3 no; Count Two - 8 yes, 4 no; Count 3 - 8 yes, 4 no; Count Four - 3 yes, 9 no. There was no request by the jury for any further instructions whatsoever and there was no request for any testimony to be read. (T. 465)

The Trial Court disclosed to both counsel that it received a voting ballot but refused to disclose its contents. (T. 465) Both counsel were totally unaware of how the deadlocked jury stood on voting when the Court stated it was "premature" to discharge the jury and that "maybe they ought to be instructed further as to going about agreeing on the matter..." (T. 465) This was a judicial hint that an Allen type charge would be given. Defense counsel immediately objected to "any further instruction from the Court" upon the ground that it "would not do anybody (i.e. the Defendant or the Government) any good." (T. 465)

The Trial Court then indicated, over this objection, that it would respond to the deadlocked jury's vote "by giving what is ordinarily referred to around here as a modified Allen charge." (T. 466). Defense counsel was given a brief opportunity to read the further instruction he had previously objected to and thereafter the jury returned at 5:22 p.m.

On its own initiative the Court then gave its so-called modified Allen Charge (T. 466, T. 469) to the jury after telling the jury it did not propose to discharge them "at this time," i.e., suppertime on a Friday evening, the day before a weekend. As a result of the modified Allen charge a jury verdict of guilty was reached the

next day, Saturday, November 17, 1973 on Count's One and Three at 1:20 p.m.

The "modified Allen charge" of the trial court went beyond the familiar language of the Allen case (Allen v U.S. (1896), 164 U.S. 492, 501 17 S. ct 154, 157) in urging the jurors to resolve their differences because the one-sided language was only aimed at the minority. Thus, although this Circuit has upheld the giving of the Allen charge itself (U.S. v Thomas (2 Cir. 1960), 282 F. 2d 191, 195, and U.S. v Tolub (2 Cir. 1962) 309 F. 2d 286, 289-290). This so-called modified Allen charge should be condemned as inherently coercive by this Court.

Appellant's position is that under the circumstances, particularly the fact that the minority jurors were aware the Trial Court knew they stood 3 and 4 for not guilty on Counts One and Three, respectively, the one sided modified Allen charge had a coercive effect upon the minority's voting; it compelled a unanimous guilty verdict on Counts One and Three by giving the minority a false notion of the validity and force of the majority's opinion, namely, that the majority have better judgment than the minority; it tended to limit full and free discussion in the jury room after the deadlock announcement. It prejudiced the accused's right to a hung jury and a mistrail by stifling the dissenting voices of minority jurors who alone were

urged to "humility," i.e., an absence of self assertion of their not guilty view.

The minority voters of the jury, by giving their ballot to the trial court, were aware the trial court knew 3 stood for not guilty on Count One and 4 voted for not guilty on Count Three. Therefore, the minority necessarily took the language of the charge as being directed at them alone, and directing that they, rather than the majority, reconsider their views. (cf. U.S. v Rogers (4 Cir 1961) 289 F2d 433, 435) This one-sidedness is the chief vice of the modified Allen charge herein.

On its face, the language of the Trial Court did not indicate which of two decisions - guilty or not guilty - must be reached. However, in context, since the trial court knew exactly how the majority and the minority stood, and both the minority and majority jurors were likewise aware of the Judge's knowledge of their ballot, the instruction in effect told the minority: "the majority will have better judgment than the mere minority". In Green v U.S. (Cir. 1962) 309 F. 2d 852, 853, 854, this was condemned as an improper intrusion by the Judge into the exclusive domain of fact finding by the jury and an improper interference with the jury by pressuring a minority to sacrifice their conscientious scrouples for the sake of reaching agreement. This Court should condemn the modified

Allen charge herein for the same reasons.

Moreover, the language of the charge indicates that judicial pressure was only placed on the minority to change their vote; only they were pressured towards unanimity. This and a false notion of the validity and force of majority opinion was imparted to the jury in the following one sided language of the charge: (1) "Every jury member [i.e., the minority] must make an honest effort * * * to try and endeavour as far as he or she honestly can to give the most careful thought to what a majority of his or her fellow jurors believe to be the just and fair solution [i.e., guilty]." (T. 467); (2) "When one finds himself or herself or themselves in a minority [i.e., the 3 "nos", for not guilty, on Count One and the 4 "nos" on Count Three]* * * it behoves every reasonable person to get into a condition of humility of mind as to his or her own process of reasoning and judgment and to consider and reconsider whether the majority [i.e., the 9 "yes" votes on Count One, and the 8 "yes" on Count Three] has not on the whole reached the soundest conclusion [i.e. "yes," or guilty]" (T. 468). This is inherently coercive because it is mandatory, not hortatory language, (3) "See whether you [i.e., the minority] can't reach a unanimous verdict. It is desirable from the standpoint of both the government and the defendant that this case be disposed of" (T. 468); (4) The defendant "is entitled to have a verdict, if it is possible, be it guilty or not

guilty. I am sure that would be his preference, one way or another, but of course I say that without consulting him". (T. 468). This language mislead the jury since trial counsel opposed any instructions. It gave the minority the idea that the accused wanted any verdict except a hung jury. (5) The Court even told the jury "our law compels a retrial unless the jury is unanimous," (T. 468), thus placing on the minority's conscience the onus that a refusal to change his vote in the interests of unanimity will cause the prospective heavy expense and the ordeal of a second trial (6) Finally, addressing the minority and only the minority jurors, whom it already told to get into a "condition of humility of mind as to his or her own process of reasoning" (T. 468), the Court told the minority to reach a verdict "*** with humility, go back there in the jury room and talk about this case and see if you can't come to a just verdict." (T. 469) The "just verdict," in the context of this charge aimed solely at the minority on Counts One and Three, was coextensive with the "just and fair solution" (T. 467) previously alluded to. The Trial Court added a qualification about not "giving up your own personal conviction" as to what the proper decision is on each of these counts" (T. 469), however, this was completely nullified by the previous directive to the minority to get "humility of mind." It was also vitiated by the Trial Court's implication that they would not be

reasonable persons if they didn't "consider and reconsider whether the majority * * * has not on the whole reached the soundest conclusion [i.e. guilty] (T. 468).

This was judicial coercion, however subtle, or unintended, upon the minority to dispose of the case before the weekend, to change their "nos" on Counts One and Three to "yes." The next day, Saturday, November 17, 1973, at 1:20 p.m. the minority gave into the pressure and changed each of the "3 nos" on Count One and the 4 "nos" on Count Three to "yes," and a unanimous verdict of guilty was returned or Counts One and Three.

Proof that the charge contained "dynamite" exists in the fact that a verdict followed almost immediately after the second giving of the modified Allen charge. Although not complained of on this appeal, there was a not guilty verdict on Count Four at 9:45 p.m. This verdict came after what appears to be less than an hour of deliberation since dinner was from about 7:00 p.m. to about 8:00 p.m. (T. 471). The guilty verdicts on One and Three followed the next day after what appears to be less than 2 hours of deliberation.

So overwhelming, so influential was the modified Allen instruction to the minority to "get into a condition of "humility" and not only to consider the majority or guilty conclusion, but to reconsider it, that the jury had

asked the Court: "Does the majority rule?" (T. 469). When a question like that is directed in writing to a Trial Court after 1 hour and 53 minutes of deliberation pursuant to a modified Allen charge, it is difficult to imagine a stronger case to illustrate the coercive impact of the charge upon the concientious vote of a minority juror. The jury's question confirms Appellant's assertion that the Allen charge gave the conscientious minority jurors a false notion of the validity and force of majority opinion, since otherwise the question would not have been asked.

In response to this note, the Trial Court, which unlike defense counsel, knew that a minority of 3 and 4 not guilty votes existed on Counts One and Three, told the jury: "No one should give up his verdict simply because a majority may be against him. What he should do is listen to the views of the majority [i.e. the 9 and 8 guilty voters] with an open mind and analyze them and discuss them and see whether perhaps the majority might be right." (T. 474) It is submitted that it would take almost superhuman steadfastness and courage for a member of the minority to resist that sort of judicial pressure, to keep his vote and thereby hang the jury by failing to dispose of the case as the Court urged previously. It should be emphasized that this last instruction was not only pressure-filled, it was clearly not

even handed. The Trial Court then told the majority (the 9 yes and the 8 yes voters) to "listen to the views of the minority," not to see if the minority might be right, but rather to "see if you [the majority] might be right." (T. 471) Thus, no judicial pressure and no duty was placed upon the majority to accomodate their views to the minority; they were merely exorted to self-examination to ascertain if they still were right.

Moreover, this second rendering of the modified Allen instruction must have been confusing to jurors. It gave a direct no, but an indirect yes answer to the majority rule question in the jury's vote. On the one hand its answer was a direct no, "absolutely not," the majority does not rule. Yet, on the other hand the Court instructed the minority -- not the majority -- to listen with an open mind to the opposite (i.e. guilty) view and see whether the majority might be right. The inevitable effect of this language on the jury was to suggest to them it was the Court's opinion that the majority was right in its guilty conclusion and the minority had only to listen with an open mind and they too would see that a guilty conclusion might be the right one. Thus, in its effect upon the jury, the answer to the request for guidance from the Court was in fact closer to yes than to no because in fact the majority happened to be right.

The effect of the pressure upon the jurors to reach a unanimous verdict to dispose of the case without a hung jury and a retrial was also evident on Saturday, November 17, 1973. A diabetic juror requiring medical observation at a hospital for 4 hours refused to stay there. Instead he signed himself out of the hospital so that he could return to the jury room to resume deliberation (T. 475). This incident was an indication that at least one juror felt compelled to reach a verdict at any cost, even if his own health was imperilled.

It is significant that the first rendering of the modified Allen charge ended without the ameliorating admonition that no juror should yield his conscientious conviction. Thus, the one sided charge "might readily be construed by the minority of the jurors as coercive, suggesting to them that they surrender their views in deference to the majority and concur in what really is a majority, rather than a unanimous, verdict." (Powell v U.S. (5 cir. 1961) 297 F.2d 318, 321; U.S. v Rogers (4 cir. 1961) 289 F.2d 433, 434).

Moreover, unlike the approved modified Allen charge in U.S. v Kahaner (2 cir. 1963), 317 F.2d 459, 483, the Trial Court did not dilute the initial charge with additional warnings that no juror should give up his individual conscientious judgment.

In Kahaner, after reading the Allen charge, the Court emphasized in a variety of ways, that "if any individual juror still retains a conscientious view that differs from that of other jurors, * * * you are not to yield your judgment"; "you are not to yield your judgment simply because you may be outnumbered or outweighed." (Id., at 438)

"You are not to yield" is imperative language. It is the language of a judicial command; it tells a minority juror in forceful terms what he must not do with the same degree of authority as "it behooves every reasonable person to get into a condition of humility of mind" (T. 467) tells a minority juror what he must do. If the Trial Court herein had used that language when it initially gave the modified Allen charge, or at least before the second jury note about majority rule, it may well have mitigated the coercive influence of the get humility language, and the overall one-sidedness of the charge. It did not and Appellant maintains this is reversible error.

This Kahaner dilutant to the Allen charge was especially required in Lee because here the Court knew the actual results of the jury's voting; it knew that a substantial minority, 4 out of 12 on Court One, and 3 out of 12 on Court Three, had made an individual conscientious judgment of "no," i.e. not guilty, on those two counts.

It is conceded that an instruction similar to the Kahaner dilutant was given after the "Does the majority rule?" note. However, the potentially curative effect of it was debilitated by the additional instruction to the minority not guilty voters: "What he should do is listen to the views of the majority with an open mind and analyze them and discuss them and see whether perhaps the majority ("Guilty") might be right" (T. 470)

In conclusion it is submitted that the modified Allen charge improperly deprived Appellant of a mistrial and denied him his right to an uncoerced unanimous verdict on Counts One and Three. The only free expression of unanimity on the part of the minority was found in the deadlock ballot delivered to the Trial Court. They were unanimous in their uncoerced minority vote for acquittal based on the evidence. It was not the evidence or the persuasive effect of the majority's arguments, or Government Counsel's summation that changed their vote to guilty. To the contrary it was a one-sided charge that imposed a duty to get humility and judicial pressure for a conclusion other than a hung jury solely on the minority. The pressure was to reach "the soundest conclusion," the one reached by the omniscient all-wise majority - guilty.

The coerced, unanimous verdict of guilty lacks the high degree of certainty that makes imprisonment

tolerable in a civilized, fair system of justice. It is uniformly accepted in our American system that "a unanimous verdict is required because of the magnitude of the consequences, because of the improbability that 12 men of disparate experience and background could err in arriving at the same conclusion. As to guilt, only a high degree of certainty can salve the conscience of society (as represented by the judge) and overcome reluctance to impose punishment upon one of its members." (Yale Professor James W. Moore, Moore's Fed. Practice, Vol. 8, p. 31-29).

Can it be said authoritatively that the unanimous guilty verdict on Counts One and Three rendered on Saturday, November 17, 1973, at 1:20 p.m. possesses the necessary "high degree of certainty" to justify 6 months imprisonment for this first offender, when 3 to 4 of his peers, less than 24 hours earlier, voted not guilty on counts One and Three and indicated that they and the majority were unable to agree on a unanimous verdict. On the record before this Court is is submitted the answer must be a unanimous "no" by this Court, and that a new trial, where the fact finders are free from coercive instructions, is required in the interests of justice.

POINT VII

UNDER BRONSTON v U.S., THE CONVICTION IS REVERSIBLE BECAUSE (1) THE COUNT ONE AND THREE QUESTIONS WERE NOT PRECISELY PHRASED AND (2) THE QUESTIONER FAILED TO PRESS ANOTHER QUESTION OR REFRAME HIS INITIAL QUESTIONS WITH GREATER PRECISION.

The primary meaning of the word "receive" is to take possession of, as receive a gift. (Webster's 3rd New International Dictionary, 1961 Ed., p. 1894) The word drop simply means to let fall in any manner, (Id., p. 694) as he dropped the envelope into the car.

Thus, on its face, there is a difference between the precise information sought by the question "Did you ever receive, i.e. take possession of, any money from Allan Handler" and the information sought by the question "Did Allan Handler ever drop an envelope containing money in your car." The former carries with it the implication of actual physical possession of an item by an individual. The latter merely carries with it the implication that an item was thrown into a car belonging to an individual. They don't mean the same thing.

On January 10, 1973 the Supreme Court of the United States, in an unanimous decision written for the High Court by Chief Justice Burger, reversed this Court's affirmance of a perjury conviction under 18 USCA 1621. (U.S. v Bronston (1972), 409 U.S. 352, 34 L. Ed. 2d 568, 93 S. Ct.

595, rev'g 453 F.2d 555 (1971).

By reasoning in accord with the High Court's reasoning in Bronston, this Court should vacate the District Court's action below in failing to withdraw the Count One and Three questions from the jury's consideration.

. Proper Use of Bronston Rule

The Trial Court correctly used Bronston v U.S. to take some of the imprecisely phrased questions away from the jury's consideration.

On the Defendant's case, just prior to his testifying, the Court instructed the jury (T. 333-335):

> The Court...In Count 1, a portion of the questions and answers which were read to you and which the government contends were wilfully and knowingly given as false answers, have been removed from your consideration. The questions that have been removed -- the defendant is neither required nor permitted to offer any testimony as to these -- are whether or not the following answers given to the following questions were knowingly and wilfully given as false material declarations:
> "Q Has Allan Handler ever handed you money?
> "A No, he hasn't."
> That is withdrawn from the case.
> "Q Did Allan Handler ever hand you a bag?
> "A No, he didn't."
> "Q Did Allan Handler ever hand you an envelope?
> "A No, he didn't."
> Those portions of Count 1 are withdrawn from your consideration. As I said to you earlier, you are not to speculate or wonder about why I have made that ruling; it is not a matter for your concern.

With respect to Count 3, the following material has been withdrawn from your consideration:

"Q Did any people pay you bribes?
"A No, they didn't.
"Q To the best of your recollection - I'm sorry, no one has paid you bribes; is that correct?
"A No, they haven't."

Those questions and answers are withdrawn. The further question and answer on Count 3:

"Q Has he" -- meaning Mr. Boone -- "ever picked up money from you?
"A No, he hasn't."

And that is withdrawn from your consideration.

You may call your next witness, Mr. Silver.

The Trial Court stated to both counsel that it would withdraw the Count One question "Has Allan Handler ever handed you money?" from the jury. (T. 292) The reason given was that "there is no evidence in support of" it (T. 292). The Government opposed this upon the ground that "the testimony of Mr. Simon will establish that Allan Handler did hand an envelope or give an envelope to Mr. Lee on that occasion in Downing Park. * * * He dropped it into an open window to Allan Handler [sic - counsel obviously meant "to Mr. Lee"], as I recall it, sitting in the car." (T. 293). Since the Government's evidence was that Handler dropped or threw the envelope into the accused car, the Trial Court ruled: "That is a Bronston-type situation isn't it? They [i.e. the grand jury prosecutor] did not really ask him the specific question." (T. 293) The Court, citing Bronston,

then excluded the "ever handed you money" question on the reasoning that "throwing something in the car, in a person's car when he is in it" is not the same thing "as hending someone an envelope." (T. 294).

Improper Use of Bronston Rule

The legal thinking underlying the withdrawal of said questions from the jury's consideration is crucial. Bronston, as interpreted by the Trial Court, "seems to put the questioner at his peril to ask the precise question of a witness who is basically faced with the issue of whether or not he may have committed the crime of perjury" (T. 294, 295).

The Trial Court's interpretation and implementation of the Supreme Court's concept of "precision" was undoubtedly correct in so far as it excluded the six questions. But its interpretation of Bronston was too narrow when it was applied to the remaining four questions in Count One and the questions remaining in Count Three.

The Government was able to authoritatively state in its trial memo of law that "In the case at bar the questions asked defendant Lee and the answers given by him are perfectly clear and susceptible to only one answer." However, everything the Supreme Court said in criticism of the trial lawyer's fatally imprecise questionning in

Bronston v U.S. may fairly be said with equal, if not greater force of the imprecise, non specific questioning of William Lee by the Grand Jury lawyer on April 23, 1973.

In Bronston, the contested question "Have you ever?" was attacked as an unspecific question. The High Court did not reach the issue of the ambiguity of the question which was described as "not free from doubt." Rather, it assumed in the context of the preceding question "Do you [now] have any bank accounts in Swiss banks, Mr. Bronston?" that the contested question "focused on petitioner's personal bank accounts." In holding that the witnesses answer was not perjurious under 18 USC 162), even though it was unresponsive on its face and was misleading to the questioner, the Supreme Court placed the burden for precise questioning where it belongs, on the questioner. "The burden is on the questioner to pin the witness down to the specific object of the questioner's inquiry." (Bronston v U.S. (1973), 409 U.S. 352, 360, 93 S. Ct. 595, 601; citing, U.S. v Wall (CA 6th 1967), 371 F. 2d 396)

In Lee the Grand Jury Assistant knew of Acrel Simon's prospective trial testimony to the effect that at Downing Park once, (and at Squire Village on two occasions) he supposedly saw a Mr. Allan Handler drop or threw an envelope into a car allegedly occupied by Appellant.

Assume arguendo that Appellant's "no sir" answer to the contested question "Did you ever receive any money from Mr. Handler" was unresponsive.. Nevertheless, in order for the questioner to be mislead he must be aware of the unresponsiveness of the answer. If he was so aware, as the Grand Jury Assistant undoubtedly was, then Bronston v U.S. declares that "the very unresponsiveness of the answer should alert counsel to press on for the information he desires" (Id. 409 U.S. at 362, 93 S. Ct. at 601). The desideratum, the information the Grand Jury Assistant desired, the specific object of the questioner's inquiry, was whether Mr. Handler once dropped an envelope containing money into Appellant's parked car in Downing Park, Newburgh. To obtain that information he had only to ask a precisely phrased question: "did Allan Handler, in Downing Park, ever drop an envelope containing money in your parked auto?" This would truly be a question which is perfectly clear and susceptible of one answer. A false answer if material, would be a valid basis for a 1623 prosecution. But the precise question was never asked by the prosecutor. Appellant submits that the Bronston decision imposed the obligation to ask the question upon the questioner when he received the unresponsive "No, sir" answer to the contested question. "The examiner's awareness of unresponsiveness should lead him to press another question or reframe his

initial question with greater precision. Precise questioning is imperative as a predicate for the offense of perjury." (Id., 409 U.S. at 362, 93 S. Ct. at 602)

Appellant submits to this Court that if a failure to press another question or reframe the initial question with greater precision was error in a case where the questioner doesn't already know the answer, a fortiori it was error in a case where the questioner already knew what the answer should be. The prosecutor's possession of the Downing Park envelope dropping information contained in the Pre-April 25, 1973 3500 material imposed an even greater responsibility upon the questioner to pose another question with greater precision. Failure of the grand jury prosecutor to remedy the unresponsive no answer by merely exercising a questioner's acuity merits reversal of the 1623 conviction.

Count Three Question

There is a considerable factual difference between one person picking up an item from another person and the latter delivering the item to the former. A man does not "pick up" an item from another person when the other person takes that item (an envelope containing money) from a third person, walks out a door, and then gives or delivers the item to him.

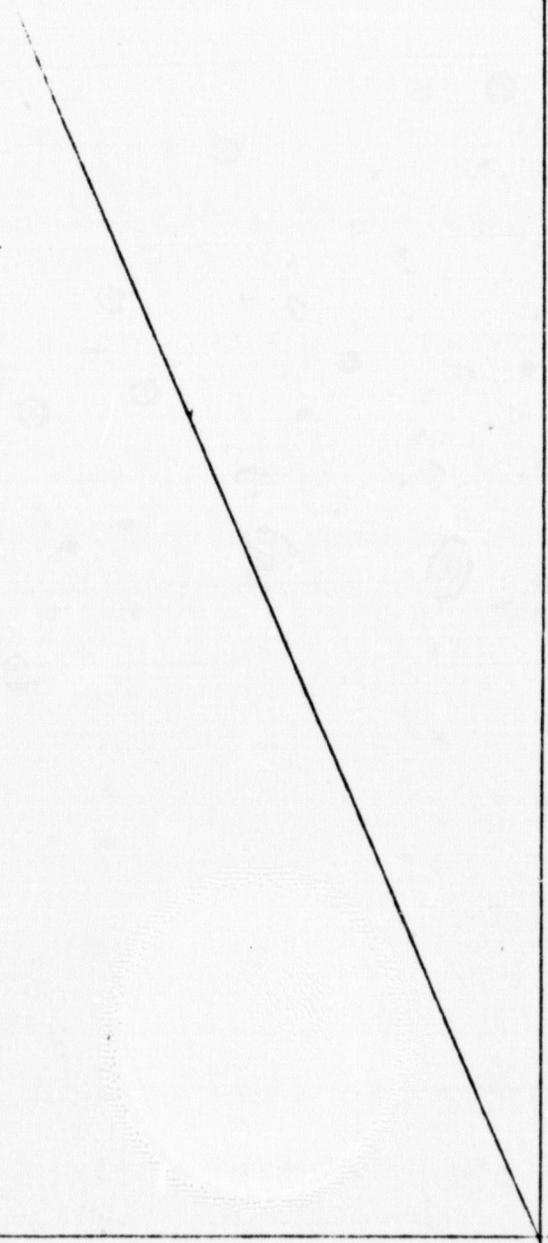
With respect to the Count Three "picked up" money question, the essence of Boone's testimony was that he delivered money to the defendant, and not that Lee "picked up" money from him:

> Government Counsel: As a result of what Nell Williams said, did you take anything to William Lee?
> Boone: Yes
>
> * * * * *
>
> Government Counsel: Following the conversation, what did you do?
> Boone: I took an envelope from Nellie and gave it to Bill Lee
>
> * * * * *
>
> Government Counsel: What happened? What did you do with that envelope?
> Boone: I walked outside and gave it to Bill Lee and walked back inside. (T. 135, 136)

Accordingly, on the rationale of Bronston, and on the analysis and arguments previously made with respect to the Count One "received" question, the "picked up" question must also be regarded as imprecise. The "no" answer to the imprecise question placed a similar burden upon the questioner to press another question or to reframe his initial question with greater precision. Failure to do so warrants a reversal because precise questioning is imperative for the offense of making a false material declaration. Like the questioner in Bronston, the Grand Jury prosecutor, could readily have reached the alleged delivery incident (Boone deliverying money to Lee) "with a single additional question by counsel alert - as every examiner ought to be - to the incongruity of petitioner's unresponsive answer."

(Bronston v U.S. 409 U.S. at 358, 93 S. Ct. at 600)

Accordingly, the Count Three "picked up" question should have been withdrawn from the jury's consideration like the other Count Three question "Did Boone ever pick up any money from you?"



POINT VIII

THE INDICTMENT UNDER us USCA 1623 AND THE SUBSEQUENT CONVICTION ARE VOID BECAUSE 18 USCA 1623 is UNCONSTITUTIONALLY VAGUE AND VIOLATES DUE PROCESS & EQUAL PROTECTION.

Vagueness - "Material," a legal term

In enacting 1623 Congress used the term "Material." Appellant submits that 18 USC 1623 is unconstitutionally vague, since it is a strictly legal term, capable of being understood only by lawyers, judges and the like. Material is not a term whose meaning would be understood by a man of common intelligence, the ordinary non-lawyer, non-judge witness in a grand jury proceeding.

The term is variously defined in dictionaries and there is no universally accepted dictionary definition of the term because it is a legal work of art. Because it is a legal term, or legal word of art, which requires legal training to comprehend, the term is beyond the competence of the ordinary non-lawyer, non-judge witness to understand, and thus it lacks the specificity required to prevent its being declared unconstitutionally vague.

Denial of Equal Protection

Under the present statutory scheme, a person, who in the opinion of the Grand Jury prosecutor testifies untruthfully, may be indicted for a violation of 1621 or 1623. The prosecutor asking the questions of the witness

under oath decides which section will be used against the witness to try the issue of his truthfulness to a jury. It is submitted that a witness is denied the equal protection of the laws when 1623 is selected and employed because the penalty (5 years and $10,000) for the act of testifying untruthfully is more severe under 1623 than it is under 1621, the procedural safeguards are practically non existent (no 2-witness rule) and the power to select the section is left in the unfettered discretion and whim of the prosecutor.

If citizen "A" is called before a grand jury and gives a sworn answer to a material question which the prosecutor deems untruthful, he may, at the whim of the prosecutor, be prosecuted under 1621. If citizen B is called before the same grand jury, asked the same material question by the same prosecutor and gives the very same answer, he may be indicted under 1623, in lieu of 1621, according to the complete whim and caprice of the prosecutor. Citizen A, upon the trial of his case, would be entitled to the protection of the time tested, traditional two witness rule and be subjected to certain penalties; citizen B would not. However, the guiding principal of the guarantee of equal protection of the laws requires that all persons be treated alike under like circumstances and conditions both in the privileges conferred and the liabilities imposed.

It is in this sense of lack of equal treatment that citizen B, or any 1623 indictee, is denied the equal protection of the laws. He stands before the Government in all his obligations to the Government on an equal footing with citizen A and every other citizen. Citizen B has the same responsibility inposed upon him, to testify truthfully that citizen A and all other citizens do. Thus, since B & A and all others have the same obligation or liability to testify truthfully before a grand jury, they ought to be treated alike with respect to the procedural safeguards or privileges conferred by 1621 and be tried under the same statute. Equal protection demands no less than this.

Accordingly, it is submitted that Appellant was denied the right to be treated equally, to have the issue of the truthfulness of his grand jury testimony tried to the jury under 1621 in lieu of 1623, and the conviction should be reversed.

Due Process Two Witness Rule

18 USCA 1623 abolishes the traditional two witness by providing that (1) "proof beyond a reasonable doubt" of the false grand jury declarations "is sufficient for conviction;" and (2) it shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence."

Notwithstanding this Court's ruling in U.S. v Ruggiero (2 Cir. 1973), 472 F.2d 599, 606, it is Appellant's position that the statute under which he was indicted violates Due Process because the common law "two witness" is constitutionally required. Thus, by abolishing the two witness rule, 18 USCA 1623 is unconstitutional on its face and the indictment and conviction pursuant to it is void.

The decision in Ruggiero did not discuss the issue presented in depth, it merely cited some language in Weiler v U.S. (1945), 323 U.S. 606, 65 S. Ct. 548, 89 L. Ed. 495, and then held that Congress' judgment controls as the two witness rule is not of constitutional dimension.

The declaration in Ruggiero that the two witness rule is not one of constitutional dimension should be reconsidered by this court in the light of this Court's prior declaration that "it is a deeply inplanted rule of our jurisprudence that perjury convictions should not rest solely on an oath against an oath, Weiler v U.S., supra, and therefore a conviction under 1621 must be proved by the testimony of two witnesses..." (Freedman v U.S. (2 cir. 1971), 445 F. 2d 1220, 1226.

It is submitted that only a rule of constitutional dimension could fairly be characterized by this Court as "a deeply implanted rule of our (i.e. American federal) jurisprudence." Constitutional rules are permanent, i.e. deeply implanted. Other rules come and go with the decisions

interpreting them. Thus, as this Court in a pre-Ruggiero decision has suggested that the traditional two witness rule is constitutional in character, the Court should reconsider its later decision in Ruggiero.

In reconsidering Ruggiero the Court is asked to note that:

> "Our system of justice rests on the general assumption that the truth is not to be determined merely by the number of witnesses on each side of a controversy***. The special rule which bars conviction for perjury solely upon the evidence of a single witness is deeply rooted in past centuries ***." (Weiler v U.S., supra 323 U.S. at 608, 610, 65 S. ct at 550). (1623, of course, permits a conviction solely upon the evidence of a single witness)

The Federal Courts have used the time tested 2 witness rule for almost 2 centruies. The fact that a statute is enacted by Congress in derogation of a long established, traditional, evidentiary rule of Federal jurisprudence which is deeply implanted in our federal jurisprudence should raise an inference that Due Process has been denied. It should place the burden on the Government to prove 1623 *is* consistent with Due Process rather than require Appellant to demonstrate it is unconstitutional. Appellant submits that enactment of such a statute necessarily raises a question under the Due Process Clause and since Appellant's liberty is being taken away by 1623, the burden is upon the Government to demonstrate constitutionality. Accordingly,

the Court is respectfully urged to reconsider Ruggiero and declare 1623 unconsitutional.

POINT IX

THE GOVERNMENT'S FAILURE TO PROVIDE THE ACCUSED PRIOR TO TRIAL WITH A BILL OF PARTICULARS CONTAINING SPECIFIC DATES, APPROXIMATE DATES, OR EVEN MONTHS, PREJUDICED HIS ABILITY TO ADEQUATELY PREPARE FOR TRIAL AND DEPRIVED HIM OF THE DEFENSE OF ALIBI.

By letter to trial counsel dated November 9, 1973 the Government furnished the accused with a list of 24 potential prosecution witnesses. Above the list of names the letter stated:

> "The United States may in the course of the Lee trial call the following or any-one of the following witnesses who will testify that they gave or witnessed the giving of monies or payments or services to William Lee."

Pages "2" and "3" of the letter purported to furnish the accused with the "time" and place of such giving of monies or payments or services to the accused. Under the first column, "Time", 22 so called times were set forth. Under a column entitled "Admissions or payments or gifts," were the 22 places of the alleged payoffs.

However, with two exceptions, ("August 23, 1970-Police Headquarters $500.00 and "Christmas" 1963-1970 "Hotel Washington," "Christmas 1968-1969" - Taxi Center Smith Street") the Government bill of particulars (the letter)

failed to give the accused the date or the approximate date, the day of the week, or the approximate day of the week, the week of the month or the approximate week of the month, the month or even the approximate month of the alleged payoff. The so-called "times" furnished to the accused for the 2 curcial alleged payoff occasions were as follows: "Time - Summer 1970 - Three occasions, Summer 1970, Downing Park, Newburgh (sic) Squire Village Shopping Center New Windsor at least #300." Since the Court on counsel's motion, eliminated the Squire Village testimony from the jury's consideration, the significant alleged payoff was the Downing Park incident.

There were 92 days and 92 nights in the summer of 1970 (June 22 through September 21). Thus, the Government's outrageously non-specific bill of particulars apprised the accused, a few days prior to trial, that anyone of 24 possible prospective witnesses will testify that he or she "gave or witnessed the giving of monies or payments or services to William Lee" on anyone of the 92 days or nights of the summer of 1970, at any hour of the day or night.

It is submitted with respect to the alleged Downing Park payoff that the failure to provide the accused with a more specific "time" deprived him of what in effect was the defense of alibi, and made it impossible for

him to defend himself against the Downing Park allegation. If the accused possessed a photographic memory in the autumn of 1973, of his activities and his whereabouts for every hour of every one of the 92 days and nights of the summers 3 years previous, and if he had a large staff of attorneys and investigators available to him a few days prior to trial, he still couldn't properly defend himself. With the bill of generalities furnished by the Government, the accused would have had to locate, interview, subpoena, and produce every single person he could remember being with for every hour of each of 92 possible days and nights in order to provide the defense of alibi, i.e. that he was elsewhere at the time of the Downing Park "summer 1970" alleged payoff incident. This lack of particularity placed an impossible burden upon the accused; one that he could not meet even if the bill were furnished well in advance of trial.

It is well settled in this Circuit that a bill of particulars is a statement of what the government will or will not claim. Moveover, "The function of a bill of particulars is to enable the accused to prepare for trial and to prevent surprise, and to this end the government is strictly limited to proving what it has set forth in it." U.S. v Murray (2d cir. 1962), 297 F.2d 812. Thus, the Governments November 9, 1973 bill limited the Government's case at trial to what it had specified.

The record indicates that trial counsel established that the time and place information sought was necessary to enable the Defendant to adequately prepare his defense and to avoid surprise. The Trial Court so ruled on October 29, 1973, at the hearing on counsel's application for a bill of particulars and for discovery:

> The Court: "Don't you think he is entitled to know how many occasions and the approximate dates, if any, and if so, the place where it was given? Aren't these things that a man would have to know to defend against an indictment of this nature?"
> Government Counsel: "I don't believe so, your Honor; I believe that the periods and times are as specific as our witnesses are able to determine at this time."
> The Court: If that is so, when they get on the stand and that is all they say, I am going to dismiss at the end of the Government's case; so I think you better particularize at least so the man can meet the issue. You don't have to give him the exact date, but it seems to me you have to give him more than you have given in the top indented paragraph of your October 11th letter. I think you ought to give him a fair shake on that question, and give him enough information so that he can make a reasonable defense. * * * I think you have to give him a closer specification of the fact that the payments were made and when and where and how much, at least within an approximation so a man can make a meaningful defense. * * * It is not enough to say it was done on several occasions during the three years named. Put yourself in the defendant's position. How can you meet a charge that on several occasions during the years 1969, 1970, and 1971 he received money from Allen Handler? How can you meet that?
> Give us at least the months and if possible the amounts. Eventually you are going to have to prove it as part of your Government's

case, aren't you?

* * *

All right, I am going to direct you to make more particular those responses in your first indented paragraph of October 11th.

* * *

He is entitled to keep his names of witnesses. He doesn't have to disclose them.

* * *

The times and places and amounts ought to be specified with at least some degree of sufficiency to permit you to defend."

The Court below thus recognized that the accused would be hurt at trial if a more specific time was not furnished before trial. It is readily apparent that furnishing Defendant with "summer 1970" for the alleged Downing Park envelope dropping incident, was not in compliance with the pre-trial directive to at least furnish the accused with "the months," such as June, July, August, September 1970. Thus, the prosecution should have been precluded from offering the "summer 1970" testimony at the trial upon the ground that the "defendant was" left so uninformed that "he was" prevented from adequately preparing for trial" (U.S. v Addonizio (3 cir. 1971) 451 F.2d 49, 65). Failure to preclude the testimony, especially where the Government was threatened before trial with dismissal at the end of the Government case if the information wasn't furnished, warrants a reversal of the conviction.

CONCLUSION

The conviction must be reversed or in THE alternative the six months jail sentence should be suspended.

Respectfully submitted,

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